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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CARPENTERS LOCAL UNION NO. 35,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board correctly interpreted Section 7 of the Labor Management Relations Act (29 U.S.C. § 157) so as to apply its protection to activities of employees of a labor organization who were terminated because they complained to the Department of Labor about alleged financial and election irregularities of their employer?

2. Whether Section 7 of the Labor Management Relations Act (29 U.S.C. § 157) was ever intended by Congress to provide relief in order to protect rights for which remedies exist within applicable sections of the Labor Management Reporting and Disclosure Act (29 U.S.C. §§ 401, *et seq.*).

PARTIES BELOW AND AFFILIATES OF PETITIONER

Pursuant to Supreme Court Rule 28.1, Petitioner states that its parent organization is the United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

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OCTOBER TERM, 1984

CARPENTERS LOCAL UNION NO. 35,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Carpenters Local Union No. 35 (hereinafter "Local 35") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding.

I.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 739 F.2d 479. That Court's order denying Petitioner's petition for rehearing is re-printed as Appendix B. The decision of the National Labor Relations Board

(Case No. 264 NLRB No. 108), which was enforced by the opinion of the Court of Appeals, is reprinted as Appendix C.

II.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on August 3, 1984. A timely petition for rehearing was filed on August 17, 1984. The Court entered its order denying rehearing on November 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c).

III.

STATUTORY PROVISIONS

The relevant part of Section 157 of the Labor Management Relations Act of 1947, as amended, and the relevant parts of Sections 411 and 412 of the Labor Management Reporting and Disclosure Act of 1959 are set forth in Appendix D to this Petition.

IV.

STATEMENT OF THE CASE

Petitioner Local 35 is a local labor organization affiliated with an International Union, located in San Rafael, California. In its capacity as a labor organization, it employs employees as business agents and organizers. Such persons are not officers of the organization, but rather are employed at the will of the membership. Such employees are not represented by any labor organization for purposes of collective bargaining.

Local 35 was found to have terminated two of its employees who were members of Local 35 because of their filing of complaints with the Department of Labor concerning alleged financial and election irregularities of Local 35 as a labor organization.

Such employees (Klaus Martin and William Prescott) were also allegedly engaged in disputes with the elected management of Local 35 concerning the way the elected officials supervised the affairs of Local 35.

Following their termination, the employees filed charges with the National Labor Relations Board alleging that their termination was caused because of activities protected by Section 7 of the National Labor Relations Act.

The National Labor Relations Board issued its complaint, and following trial, the Administrative Law Judge determined that the terminations were a result of these activities by the charging parties but that the Board lacked jurisdiction under Section 7 to remedy this situation.

Following exceptions filed by the General Counsel of the National Labor Relations Board, the National Labor Relations Board issued its decision reversing the Administrative Law Judge and determining that the activities of the charging parties (Prescott and Martin) in filing complaints with the Department of Labor concerning the internal union affairs of Local 35 were protected within the meaning of Section 7 of the National Labor Relations Act. Thus, the Board ordered Local 35 to reinstate and make whole the charging parties because of their illegal terminations.

The Court of Appeals for the Ninth Circuit enforced the decision of the National Labor Relations Board and upheld its determination that the activities which were the subject of the termination were protected within the meaning of Section 7 of the National Labor Relations Act and held

that it must and could defer to the National Labor Relations Board's interpretation of Section 7 notwithstanding the Board's prior rulings to the contrary and notwithstanding this Court's delineation of protected rights of union employees as set forth in *Finnegan v. Leu*, 456 U.S. 431 (1982). Accordingly, the Board's decision was enforced, and Local 2[illegible] was ordered to reinstate and make whole its former employees, Martin and Prescott.

REASONS FOR GRANTING THE WRIT

The Board's extension of Section 7 rights to employee-members of a labor organization whose activities did not involve their own wages, hours or other terms and conditions of employment has broadened the meaning of Section 7 of the National Labor Relations Act (29 U.S.C. § 157) far beyond its plain meaning and a reasonable interpretation of the Congressional objective.

Although the National Labor Relations Board was given considerable authority to interpret the National Labor Relations Act (hereinafter referred to as the Act), such authority is not unlimited. And while the Court has long held that considerable deference should be given to the Board's interpretation as long as it is "reasonably defensible" (see *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)), the Court has nevertheless held on many occasions that such authority must be limited where the Board's interpretation has "no reasonable basis in law", or is "fundamentally inconsistent with the structure of the Act", or is an attempt to "usurp major policy decisions properly made by Congress", or where the Board was "moving into a new area or regulation which Congress had not committed to it." See *NLRB v. Iron Workers*, 433 U.S. 335 (1978); *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Company*, 404 U.S. 157 (1971); *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v.*

Insurance Agents, 361 U.S. 477 (1960); *Bill Johnson's Restaurants, Inc. v. NLRB*, . . . U.S. . . ., 103 S.Ct. 2161 (1983).

Moreover, this Court has noted with some caution that the lack of consistency in Board interpretations serves as a legitimate basis to question its determinations. See *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). See also *Bill Johnson's Restaurants v. NLRB, supra.*

The decision of the Board as enforced by the Court broadened the rights of employees far beyond the plain meaning of Section 7 of the National Labor Relations Act (29 U.S.C. § 157).

That Section simply gives employees the right to organize themselves, to form, join or assist labor organizations to select representatives, and to engage in other activities, all for the purpose of "collective bargaining or mutual aid or protection."

As both the Board and the Court below found, the activities of the employees of the Petitioner in this case had nothing to do with effectuating their *own* wages, hours or other terms and conditions of employment, nor were they seeking to form or join a labor organization, nor were they seeking to have a labor organization represent them for purposes of collective bargaining. Rather, their activities were limited to seeking to complain about certain practices of their union with the governmental agency charged with the responsibility of enforcing the Labor Management Reporting and Disclosure Act.

Before this particular decision, the board has consistently held that internal union activities by employee-members of labor organizations are not necessarily protected by Section 7 of the National Labor Relations Act. See, for example, *Butcher's Union Local 115 (Ernest S. Cerelli)*, 209 NLRB 806 (1974); *Retail Clerks Local 770 (Carl Palmer)*, 208

NLRB 356; and *Retail Clerks Local 876 (Barbara Fra-[illegible]r)*, 212 NLRB 31. See also *Auto Convoy Co. and Teamsters Local 657*, 267 NLRB No. 97 (1983).

As noted, both the Administrative Law Judge and the Board determined that the activities of the charging parties were not related to their own wages, hours or terms and conditions of employment, but rather were related to activities of their union as a labor organization.

Nevertheless, the Board determined that such activities of the charging parties—namely, the filing of complaints with the Department of Labor concerning internal union matters—were protected by Section 7 of the Act.

This Court has previously had occasion to look at the rights of a labor organization as an employer, vis-a-vis its own employees, and has determined in *Finnegan v. Leu*, 456 U.S. 431 (1982), that a labor organization as an employer has certain rights, vis-a-vis its employees, notwithstanding those employees' rights as members of the organization. In *Finnegan*, this Court specifically upheld the right of the leadership of a labor organization to terminate employee-members because of their lack of loyalty to the leadership or a desire to effectuate the new leadership's goals by "cleaning house."

Similarly, Congress, in passing the Labor Management Reporting and Disclosure Act of 1959, created certain rights for union members, including the right, among others, of being able to file complaints with the Department of Labor concerning alleged irregularities in union administration. At the same time that Congress created these rights, Congress gave to individuals who are injured in the exercise of these rights the ability to seek relief in federal

court for the wrongs occasioned them by the exercise of such rights. (See 29 U.S.C. § 412.)[1]

In view of the Board's decision, it is difficult to reconcile the conflict between the Board's approach to Section 7 rights with the obvious Congressional scheme in creating rights for union members as union members under Section 411 and 412 of the Labor Management Reporting and Disclosure Act.

We submit that had Congress intended the National Labor Relations Act, and specifically Section 7 thereof, to effectuate the rights of employee-members of labor organizations with respect to the making of complaints unrelated to their own wages, hours or other terms and conditions of employment, then there would have been no purpose in creating Section 412 of the Labor Management Reporting and Disclosure Act as to them.

Membership rights in a labor organization are entirely different than the rights of individuals as employees of that labor organization. There is no question that when the labor organization acts as an employer, it must afford to its employees the same rights under Section 7 of the National Labor Relations Act as any other employer. However, this means that the right of employees of a labor organization to engage in activities for the purposes of effectuating their own wages, hours or other terms and conditions of employment, or to seek collective bargaining with their employer, must not be interfered with. In the absence of a finding that the activities of the charging parties were related to their

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[1] In fact, one of the charging parties (Klaus Martin) specifically sought redress in the United States District Court pursuant to Section 412, alleging that he was terminated in violation of his rights under the Labor Management and Disclosure Act. As a result of the settlement of that action, his underlying unfair labor practice action was likewise settled so that the Court's order, if enforced, does not afford to Martin reinstatement or back pay but still requires other remedies.

own wages, hours or other terms and conditions of employment, it is respectfully submitted that the Board has gone far beyond those activities which are protected by Section 7 of the National Labor Relations Act.

Since the activities of the charging parties were not for the purposes of effectuating their own wages, hours or terms and conditions of employment, the only remaining inquiry for the Board and the Court was to determine whether or not their activities were otherwise protected within Section 7 of the Act.

While their activities may have been subject to other statutory protections, as previously noted, the particular activities of the charging parties could not have fallen within the ambit of Section 7. See, for example, *Tyler Business Systems v. NLRB*, 680 F.2d 338 (4th Cir. 1982); *Keyway, a Division of Phase, Inc.*, 268 NLRB No. 172 (1982); *Meyers Industries, Inc.*, 268 NLRB No. 73 (1984). See also *NLRB v. City Disposal Systems*, . . . U.S. . . ., 79 L.Ed.2d 839 (1984).

In fact, as some of the cases above suggest, the Board has retreated on what the concepts of activities protected under Section 7 of the Act really are. In the recent case of *Butterworth Mortuary*, 270 NLRB No. 148 (1984), the Board had little trouble in limiting Section 7 rights of employees by setting aside its long-held concepts of the rights of workers to be protected for respecting picket lines.

In view of this obvious retreat by the NLRB of what Section 7 rights are, it is even further difficult to reconcile the broadening of Section 7 rights to persons who are concededly not engaged in activities designed to further their own wages, hours or other terms and conditions of employment.

Thus, it is difficult to reconcile how the Board is able to interpret Section 7 of the National Labor Relations Act in

such a fashion as to grant Section 7 rights to persons whose activities are not specifically protected by the statute. Clearly, therefore, the Board has gone far beyond the level to which deference can or should be granted in the interpretation of the National Labor Relations Act.

Because of the conflict between the Board's previous decisions, along with this Court's acknowledgment of the rights of a labor organization as an employer to terminate employee-members without violating applicable law, it is clear that the conflict must be reconciled by this Court. To do otherwise leaves every organization or employer subject to the National Labor Relations Act in a quandary as to exactly what activities are to be considered protected and what are not.

CONCLUSION

In view of the Board's substantial broadening of Section 7 rights to include activities which are not related to employees' own wages, hours or other terms and conditions of employment, and in view of the Board's interpretation of Section 7 far beyond that which could have been intended by Congress, it is necessary that the petition for Writ of Certiorari be granted.

DATED: January 28, 1985.

Respectfully submitted,

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Appendix A

United States Court of Appeals
fot the Ninth Circuit
No. 83-7424
NLRB No. 20-CA-14859
No. 20-CA-15029
National Labor Relations Board,
Petitioner,
vs.
Carpenters Local Union No. 35,
Respondent.
[Filed Aug. 3, 1984]
On Application for Enforcement of an Order
of the National Labor Relations Board
OPINION
Argued and Submitted May 14, 1984

Before: DUNIWAY, ANDERSON and SKOPIL, Circuit Judges
SKOPIL, Circuit Judge:

The National Labor Relations Board ("Board") petitions for enforcement of its order finding that Carpenters Union Local 35 ("Union") violated section 8(a)(1), 29 U.S.C § 158(a)(1), by unlawfully discharging two employees. Substantial evidence in the record supports the Board's findings. The Board correctly applied the law. Accordingly, we will enforce the Board's order.

FACTS AND PROCEEDINGS BELOW

Klaus Martin and William Prescott are members of the Union. Additionally, they were employed by the Union as assistant business representatives and/or organizers. They were also elected to the Union's Executive board. Martin was a trustee and Prescott was "conductor".

As a trustee, Martin was responsible along with others for supervising Union funds. In the course of such duties, Martin became concerned about the Union's handling of certain monies. Martin sought to (1) change auditing firms, (2) prevent the payment of retired members' dues from Union funds, and (3) reinvest strike funds into higher interest bearing accounts. Martin also challenged an apparent unauthorized expense reimbursement and the handling of a donation which was allegedly deposited into an incorrect account.

Martin raised these issues at regular Union membership meetings and at Executive Board meetings. His allegations were often disputed by the Financial Secretary. Martin requested a credit check on the Financial Secretary's personal business dealings to determine if there existed any basis for conflict of interest. The investigation uncovered no conflict and the Financial Secretary became "very irate" when the bill for the investigation was submitted to the Union.

Martin and Prescott also contacted the Department of Labor ("DOL") to complain about Union affairs. They alleged that irregularities occurred in the election nominating process, that members not in good standing in the Union would be allowed to vote in the upcoming election, and that the Union had mishandled various funds. The DOL told Martin and Prescott to first exhaust Union remedies and to further substantiate their allegations of fund misuse. Consequently, over the next few months, Martin and, from time to time, Prescott and other Union members met with DOL representations to review the financial allegations.

When elections were held, the Financial Secretary was reelected and Martin was defeated in his bid for reelection.

Prescott was declared ineligible for office because of delinquent dues. Following the election Martin, Prescott and others filed election protests. They submitted their allegations to the International Union which eventually denied the challenges. Thereafter, the protesting members filed a complaint with the DOL alleging election violations and misuse of funds.

When Prescott requested that his Union employment be extended, the Executive Board voted not to renew it. At the same meeting, Martin's indeterminate term was changed to a fixed term.

At the next regular membership meeting the election protest letter to the International was read aloud. Martin, Prescott and the others who signed the letter were characterized as "troublemakers". At a later membership meeting, the Financial Secretary moved that Martin be discharged from his employment with the Union. The Financial Secretary cited to the many "problems" that Martin had caused, specifically noting Martin's investigation of the Secretary's personal finances. The Union's Business Agent also spoke in favor of the discharge, pointing out that, because of Martin and others, the government was "coming into the offices" the next day for an investigation. The membership thereupon terminated Martin's employment. The following day the Business Agent told Martin that he was fired "for going to the government and for investigating [the Financial Secretary]". Martin received a termination letter from the Union stating that the cause of discharge was "for conduct unbecoming an officer". Later, the Financial Secretary told another Union member that Martin and Prescott were fired because they had filed charges with the DOL.

Based on these events, the Union was charged with committing an unfair labor practice. An ALJ found, however, even assuming both were discharged for the described activities, that no unfair labor practice occurred because the employees' activities, while "concerted", were not "for the purpose of collective bargaining or other mutual aid or protection."

A divided Board disagreed, holding that the activities were protected and that the Union, acting as an employer, violated section 8(a)(1) of the Act by discharging Martin and Prescott. The Board seeks enforcement of its order requiring that the Union cease and desist from the unfair labor practice and reinstate Prescott with back pay. Martin has settled with the Union concerning any reinstatement and back pay awards.

DISCUSSION

A. Standard of Review

We will enforce the Board's order if the Board's findings of fact are supported by substantial evidence in the record and if the Board correctly applied the law. *NLRB v. Nevis Industries Inc.*, 647 F.2d 905, 908 (9th Cir. 1981). The Board's interpretation of the Act is entitled to deference, and will be upheld if reasonably defensible. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979).

B. Substantial Evidence

The Union argues that Prescott and Martin would have been terminated notwithstanding their alleged protected activities. The Union asserts that the decision to not reemploy Prescott was made before the alleged activities. The

record shows, however, that Prescott's request for an extension was denied in the midst of the controversy. Additionally, the Union argues that Prescott's services were no longer needed. The unrefuted evidence shows that Prescott was working 80 hour weeks. We agree with the ALJ that the Union's claimed "good cause" reason for discharging Prescott was a "mere pretext".

The Union suggests that Martin was terminated before the expiration date of his term because he was disabled. The Financial Secretary noted Martin's disability in support of his notion to the membership to terminate Martin's employment, and later remarked to another Union member that Martin was "unable to perform his job." But, there is substantial evidence that Martin was terminated for complaining to the DOL. Martin was referred to as a "troublemaker." Union officers told him and others that the discharge was made because he went to the government and filed charges. Finally, the minutes of the meeting in which the membership voted to discharge Martin note that he was terminated "not because of his disability but for misconduct as an employee and an officer."

The Union further argues that the Board erred in not properly applying the mixed motive analysis of *Wright Line*, 251 NLRB 1083, *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). But, the Board found that Martin and Prescott were discharged solely for engaging in the described activities and accordingly the mixed motive analysis of *Wright Line* need not be applied. We find adequate support in the record for that conclusion. Union officials stated that the two were discharged for their complaints to the DOL and for their investigative activities. There is no evidence to suggest that the two failed to perform their respective jobs. Accordingly, we find sufficient evidence in the record to support the Board's findings

that the two were discharged for engaging in the described activities.

C. Protected Activity

The Union argues that the discharges were not unlawful because the activities at issue are not protected by the Act. Section 8(a)(1) makes it an unfair labor practice for any employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in section 7. Section 7 provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157.

Martin and Prescott were not seeking to organize, to form or to join a labor organization in their capacity as Union employees. *See, e.g., Retail Clerks International Association v. NLRB*, 366 F.2d 642 (D.C. Cir. 1966) (unfair labor practice for union to refuse to bargain with its organized employees). Instead the Board found that Martin and Prescott were engaged in intraunion activity, "acting in their capacity as union members," by seeking assistance from the DOL for alleged election and fund irregularities. The Board argues that by invoking such processes, Martin and Prescott "were expressing their concerns as members and elected officers of the Union and taking action of the sort that was reasonably likely to benefit both themselves and their fellow carpenters." The two were engaged in concerted activity for the purpose of "mutual aid or protection" because, as the Board argues, they were attempting to "protect the integrity of their collective bargaining representative."

Activities for "mutual aid or protection" within the meaning of section 7 are not limited to either the employer-employee relationship or to acctivities intended to change terms or conditions of employment. *E.g., NLRB v. Southern California Edison Co.*, 646 F.2d 1352, 1364 (9th Cir. 1981)(sympathy strike); *Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1385 (9th Cir. 1976)(employee political lobbying). Attempts by employees to bring about changes in their union's performance as their collective bargaining representative are protected by section 7. *NLRB v. Transcon Lines*, 599 F.2d 719, 721 (5th Cir. 1979).

The Union relies on *Finnegan v. Leu*, 456 U.S. 431 (1982). There the Court held that the discharge of a union's appointed business agents by the newly elected union president did not violate sections 101(a)(1) and (2), 29 U.S.C. §§ 411(a)(1) and (2), of the Labor-Management Reporting and Disclosure Act (LMRDA). The Court reasoned that the LMRDA was intended to protect only rank-and-file union membership and not job security or tenure of union employees. *Id.* at 436-37, Thus, the Union's discharge of Martin and Prescott does not violate the LMRDA since their union memberships were not threatened. But, unlike the LMRDA, section 8(a) protections are intended to protect the employee-employer relationship. While the LMRDA may be the "source for the protection of a union member's right to participate fully and freely in the internal affairs of his own union," the legality of these discharges must be resolved within the framework of the National Labor Relations Act. *Retail Clerks Union, Local 770*, 208 NLRB 356, 357 (1974). *Accord. NLRB v. Local 212, International Union*, 690 F.2d 82, 85 (6th Cir. 1982) (distinguishing *Finnegan* and holding that a union violates 8(b)(1) by removing union member from committee for member's exercise of protected right to file unfair labor charge).

The Union also relies on Board authority holding that newly elected union officers may purge old employees and install their own supporters. *E.g., Retail Store Employees, Local 876,* 212 NLRB 113 (1974); *Local 770,* 208 NLRB 356 (1974); *see also Butchers Union Local 115,* 209 NLRB 806 (1974) (upholding right to discharge union employee because of employee's intraunion political aspirations). We believe that the interests at stake here are different than in "patronage" cases. There is no evidence that the discharges were made because Martin or Prescott sought to change the Union's administration. A union may properly value loyalty and cooperation of its employees. *Shenango Inc.,* 237 NLRB 1355, 1355 (1978). But a union does not have the same legitimate interest in shielding itself from allegations of illegal conduct made by members. The Board recognized that public policy considerations dictate that employees be afforded full and unimpeded access to governmental agencies to voice their concerns. *Carpenters Local Union 35,* 264 NLRB 795, 797 (1982)(citing cases). The policy is hindered by allowing a union to discharge employees who raise good faith concerns.

The Board has the responsibility to determine in the first instance the "boundaries" of section 7. *Eastex, Inc. v. NLRB,* 437 U.S. 556, 568 (1978). The Board's special competence in this field justifies that deference be accorded that determination. *NLRB v. Weingarten, Inc.,* 420 U.S. 251, 266 (1975). In *Weingarten,* the Court upheld the Board's choice because "the Board has reached a fair and reasoned balance upon a question within its special competence, its newly arrived at construction of § 7 does not exceed the reach of that section, and the Board has adequately explicated the basis of its interpretation." *Id,* at 267; *see also NLRB v. City Disposal Systems, Inc.,* . . . U.S. . . ., 104 S.Ct. 1505, 1510 (1984) (reaffirming Board's

role of defining the scope of section 7 and giving considerable deference to its decision).

Similarly, the Board here reached a fair and reasoned balance. Admittedly, the activities sought to be protected are only incidently related to the employee's union status. Martin and Prescott sought to correct what they believed to be violations of election procedures and misuse of funds. The interest protected was not their own but the integrity of their bargaining representative. The Board's interpretation of section 7 to reach the activities here cannot be said to be unreasonable. The interests sought to be protected are defensible under the Act, and accordingly, the Board's interpretation is entitled to deference.

CONCLUSION

There is sufficient evidence in the record to support the Board findings on the cause of Martin's and Prescott's discharges. The Board properly applied the law. Accordingly, the Board's order will be enforced as modified to reflect Martin's settlement.

ENFORCED.

Appendix B

United States Court of Appeals
For the Ninth Circuit
No. 83-7424
NLRB No. 20-CA-14859
No. 20-CA-15029
National Labor Relations Board,
Petitioner,
v.
Carpenters Local Union No. 35,
Respondent.
[Filed Nov. 20, 1984]
On Application for Enforcement of an
Order of the National Labor Relations Board

Before: Duniway, Anderson, and Skopil, Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Anderson and Skopil have voted to reject the suggestion for rehearing en banc, and Judge Duniway recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

Appendix C

264 NLRB No. 108
United States of America
Before the National Labor Relations Board
Case 20—CA—14859
Case 20—CA—15029
Carpenters Local Union No.35
and
Klaus Martin, an Individual
William J. Prescott, an Individual

DECISION AND ORDER

On October 10, 1980, Administrative Law Judge Joan Wieder issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a brief in support thereof and in support of the Administrative Law Judge's dismissal of the complaint.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings[1] and conclusions of

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that the discharge of employees Klaus Martin and William Prescott, the Charging Parties herein, by their Employer, Carpenters Local Union No. 25, Respondent herein, for having complained to the Department of Labor about certain financial and election irregularities and, in Martin's case, also for having caused an investigation to be conducted of Respondent's financial secretary by a local credit association, did not violate Section 8(a)(3)[2] and (1) of the Act since, in her view, such activities were not protected by Section 7 of the Act.[3] We disagree.

Briefly, the facts herein reveal that Respondent is a labor organization[4] engaged in the business of representing employees of employers located within Marin County, California. Respondent is governed by an executive board which

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[2] Contrary to the Administrative Law Judge, the complaint does not allege a violation of Sec. 8(a)(3) of the Act. Consequently, we find it unneccessary to determine whether Prescott's or Martin's discharge violated that provision of the Act.

[3] The Administrative Law Judge, relying on the Board's recent decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), also noted that, even if Martin's activity in complaining to the Department of Labor were found to be protected, as the General Counsel alleges, the latter had nevertheless failed to establish that Martin would not have been discharged in the absence of such protected activity.

[4] Respondent is a duly chartered local union of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and is affiliated with the Bay Counties District Council of Carpenters, which is composed of various carpenter local unions within the San Francisco Bay area.

consists of 10 elected officer positions.[5] Its day-to-day operations are handled by the financial secretary and a business representative, both of which are elective, full-time positions. Since 1977, William Wilson has held the position of financial secretary and Clarence Murfin has served as Respondent's business representative. Additionally, Respondent has often employed one or two assistant business representatives who report directly to the business representative.

The record reveals that, from 1975 until the expiration of his term in July 1979, Martin held the position of trustee on Respondent's executive board. Furthermore, from 1975 until his discharge on September 4, 1979, Martin was employed by Respondent as an assistant business representative, initially for 3-month periods, then for 6-month periods, and finally, in 1977, for an "indeterminate" term.

Prescott also served on the executive board as conductor from 1977 to July 1, 1979. Additionally, he was hired by Respondent as an assistant business representative for a 6-month period which expired in December 1978. Upon expiration of that period, Prescott was rehired as an assistant business representative and given the additional duties of organizer for a term ending June 30, 1979.[6]

In January, Martin expressed to Wilson his concern over the competency of the auditing firm traditionally used by Respondent and recommended to Wilson that a different

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[5] President, vice president, financial secretary, recording secretary, treasurer, warden, conductor, and three trustees.

[6] All dates hereinafter are in 1979, unless otherwise indicated.

firm be retained. Wilson, however, declined to follow Martin's recommendation.[7] Early in 1979, Martin also recommended to Wilson that some of Respondent's funds be placed in different bank accounts where they would draw higher interest. Wilson again declined to follow Martin's recommendation. Martin then became suspicious of Wilson and, during the next several months, he began to examine closely Respondent's books and records. As a result of his investigation, Martin uncovered what he believed to be evidence of financial improprieties. Thus, Martin came to believe that Wilson was improperly arranging to have dues of retired members paid out of union funds, that checks were surreptitiously being written for that purpose, and that an improper reimbursement had been made to an individual and documents forged on his behalf. Furthermore, Martin was concerned about Wilson's handling of a $1,200 check which had been donated to Respondent. In addition to speaking to Wilson and to then Union President Robert Mitchell on these matters, Martin also spoke out at executive board meetings and general membership meetings on these issues.

On May 1, Respondent held a meeting to nominate candidates for the various officer and business representative positions in anticipation of an election scheduled for

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[7] According to Martin, the trustees, whose duties are described in sec. III, A, of the Administrative Law Judge's Decision, had a fiduciary duty to prevent embezzlement and were responsible for the hiring of auditors. Thus, following Wilson's refusal to follow his recommendation, Martin presented a proposal for a different auditing firm to the other trustees and to the executive board which was readily accepted over Wilson's objection. Wilson, however, took the matter to the full membership which voted to return the question to the executive board. The end result was that the auditing firm that Respondent traditionally used was retained.

June 7.[8] At that time, Wilson and Martin were, respectively, nominated for the positions of financial secretary and trustee, Murfin was nominated for treasurer and business representative, and Prescott was nominated for vice president and business representative. Shortly thereafter, however, Wilson informed Prescott that because his dues had been in arrears during the preceding 12-month period, Prescott was disqualified from running for these offices in accordance with Respondent's bylaws.

On May 2, at the request of the business representative for the San Mateo County local union and without objection from Murfin, Martin visited a San Mateo jobsite to investigate a Marin County contractor who had been conducting business in San Mateo County. While there, Martin was assaulted by the individuals he was investigating and, as a result thereof, was unable to return to work from that day until he was discharged.

Several days later, Martin was driven by Prescott to the offices of the Department of Labor where they complained about what they believed to be irregularities in the May 1 nominating procedures and about the alleged mishandling of union funds by Wilson. With respect to the alleged irregularities in the nominating procedures, the Department of Labor advised Martin and Prescott that they would first have to exhaust their internal union procedures before a formal complaint could be made. As to the alleged mishandling of union funds, they were advised that an investigation could be undertaken but that more substantiation would be needed. During the next several months, Martin, at times accompanied by Prescott and on other occasions by one or two other union members, made several

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[8] The terms of all officers on the executive board were due to expire on the first Tuesday in July.

trips to the Department of Labor to further discuss the above allegations. Additionally, in an apparent effort to document his claim of alleged misuse of union funds by Wilson, sometime during the month of June, Martin sought to obtain information from the Marin County Credit Association, in which Respondent had an account, concerning Wilson.

On June 7, the election for officers was held as scheduled at which time Martin was defeated in his bid for reelection as a trustee.[9] Thereafter, by letter dated June 21 and prepared by Martin's attorney, Martin, Prescott, and four other members protested the election results to the International Union alleging certain irregularities in the nominating procedures and the ineligibility of certain voters who participated in the election.[10]

Prescott's term of employment, as noted above, expired on June 30. At a general membership meeting held on July 3, Prescott sought to have his employment term extended for another 6 months but, on a motion by Wilson, the matter was referred to the executive board for decision. On July 9, the executive board met and, on Murfin's recommendations, decided that a second assistant business representative was not needed and, consequently, declined to extend Prescott's term. Furthermore, during that meeting, the executive board, on a motion by Wilson, voted to have Martin's term as assistant business representative expire on September 30, rather than have it continue on an "indeterminate" basis.

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[9] Wilson and Murfin, who ran unopposed, were reelected to the positions they previously held.

[10] According to Prescott's undisputed testimony, during a membership meeting held on July 17, Respondent's recording secretary, Joseph Derrough, read the letter aloud to the members and referred to Martin, Prescott, and the other four signatories as "troublemakers."

On July 30, the International Union denied the election protest filed by Martin, Prescott, and the other four members and, by letters dated August 6 and 9, Martin's attorney took issue with the International's findings. Furthermore, in the August 9 letter, Martin's attorney indicated that a further investigation had confirmed Martin's allegations of financial impropriety and accused Respondent of having violated the Labor Management Reporting and Disclosure Act (LMRDA). He further threatened to contact the Department of Labor and to commence a civil action in Federal court against Respondent. On August 23, Martin's attorney filed a formal complaint with the Department of Labor on behalf of Martin, Prescott, and the other four signatories to the June 21 letter, alleging that Respondent's financial secretary, Wilson, had mishandled union funds.

In late July, Wilson got hold of a billing from the Marin County Credit Association regarding Martin's earlier request for information concerning Wilson and became very upset over it. Subsequently, at a general membership meeting held on September 4, Wilson moved to have Martin terminated.[11] The motion was thereafter carried and Martin was effectively terminated as of September 4.[12]

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[11] Wilson had previously inquired of the International Union as to the safest method for terminating Martin. The International Union advised Wilson that, in order to avoid lawsuits against members of the executive board, Martin should be terminated by a vote of the general membership.

[12] The minutes of the September 4 meeting reflect that Wilson's sole reason for wanting Martin discharged was because of the latter's investigation of Wilson with the Marin County Credit Association. However, during the hearing, Wilson gave additional reasons for Martin's discharge. Thus, Wilson testified that Martin was also discharged for not performing his duties as required when he made the trip to San Mateo County, for not getting along with other employees, including Wilson, for abusing his office by looking into the financial records of

The Administrative Law Judge found, and we agree, that Prescott was discharged solely for complaining to the Department of Labor and that Martin was discharged for complaining to the Department of Labor as well as for conducting an investigation of Wilson with the Marin County Credit Association.[13] However, as noted above, the Administrative Law Judge further found that their conduct was not protected by Section 7 of the Act and that, consequently, their discharges were not unlawful.[14] As previously indicated, we disagree with that finding.

The Board has long held that public policy considerations dictate that employees be afforded full and unimpeded access to other governmental agencies.[15] Furthermore, in administering the Act, the Board, as recognized by the Administrative Law Judge, does not act in a vacuum but rather is charged with considering the full panoply of

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other members, for being dishonest when questioned about the Marin County Credit Association incident, and for seeking to have a different auditing firm retained without first obtaining the requisite approval of the general membership.

[13] The Administrative Law Judge found, and we agree, that the other stated reasons for Martin's and Prescott's discharges were pretextual.

[14] The Administrative Law Judge, relying on the Board's decision in *Butchers Union Local 115, affiliated with the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (Ernest S. Cerelli)*, 209 NLRB 806 (1974), found that Prescott's and Martin's conduct was similar to that of corporate employees attempting to effectuate a change in management hierarchy and was, therefore, unprotected.

[15] See *General Teamsters Local Union No. 528, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Theatres Service Company)*, 237 NLRB 258, fn. 1 (1978); see also *Local Union No. 5163, United Steelworkers of America, AFL-CIO (Charles A. Bizzaro)*, 248 NLRB 943 (1980); *The Tappen Company*, 228 NLRB 1389 (1977); *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975).

congressional labor policies, including those embodied in the LMRDA, in determining the legality of conduct engaged in by a respondent.[16] Mindful of these principles, the Board recently held, on facts similar to those found herein, that the discharge of a discriminatee from his position of assistant administrator of a union's welfare and pension funds for activities undertaken as secretary-treasurer of the union violated Section 8(a)(1) of the Act.[17] Thus, in *Welfare and Pension Funds, supra,* the Board found that the discriminatee, Montuoro, had been engaged in protected intraunion activities consisting, *inter alia,* of seeking reelection to the position of secretary-treasurer, assisting another union member, Smith, in filing a complaint with the Department of Labor over election irregularities, and providing Smith with information pertaining to union finances, when he was unlawfully discharged by his employer, Welfare and Pension Funds, for engaging in such activities.

Similarly, in the instant case, we find that Prescott and Martin were also engaged in intraunion conduct protected by Section 7 of the Act when, acting in their capacity as union members and, in Martin's case, also as trustee, they complained to the Department of Labor of alleged irregularities in the election nominating procedures and of the alleged misuse of union funds by Wilson. Furthermore, it is evident from the facts herein that in having Wilson's

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[16] See *Jacobs Transfer, Inc.*, 201 NLRB 210 (1973); *Carpenters Local Union No. 22, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (William Graziano, d/b/a Graziano Construction Company)*, 195 NLRB 1 (1972).

[17] *Welfare and Pension Funds, Blasters, Drillrunners and Miners Union Local No. 29 and their Trustees Louis Sanzo, Amadio A. Petito, Paul Crowley, and Theodore King,* 251 NLRB 1241 (1980).

finances investigated with the Marin County Credit Association, Martin was seeking to obtain information in connection with the complaint filed with the Department of Labor concerning Wilson's alleged misuse of union funds. Under these circumstances, it is clear that Martin's investigation of Wilson with the Marin County Credit Association was intimately related to and done in furtherance of his other activities found to be protected herein. Consequently, we find, contrary to the Administrative Law Judge, that Martin's conduct in this regard also constituted protected concerted activity within the meaning of Section 7 of the Act. Having found that the activities engaged in by Prescott and Martin were protected by Section 7 of the Act, we further find that their discharge by Respondent, acting in

its capacity as an employer,[18] for having engaged in such conduct violated Section 8(a)(1) of the Act.[19]

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[18] The fact that Respondent is also a labor organization does not negate our finding herein since it is well established that when a union takes on the role of an employer, the Act applies "just as it would to any other employer." *Office Employees International Union, Local No. 11 [Oregon Teamsters] v. N.L.R.B.*, 353 U.S. 313 (1957).

Our dissenting colleague does not dispute the fact that, as an employer, Respondent "is subject to the same strictures under the Act as any other employer." Nor do we dispute his assertion that the Respondent, like any other employer, has an inherent right to operate and maintain its business. However, we note that he, as well as the Administrative Law Judge, has erred in concluding that Martin and Prescott were discharged from their positions as assistant business representatives for actions undertaken as employees concerning "their Employer's conduct of its business." Rather, the evidence firmly establishes that Martin and Prescott's conduct in complaining to the Department of Labor and conducting an investigation of Wilson with the Marin County Credit Association was undertaken not in their employment capacity of business representatives but as previously stated as members of, and in Martin's case, as an officer of, the Union. In this regard, it is clear that their discharge by Respondent was motivated not by any employee misconduct on their part but rather by their intraunion activity, which conduct our dissenting colleague would readily admit is protected by the Act. In light of these facts, we fail to see how our dissenting colleague can conclude that the discharge of Martin and Prescott did not violate Sec. 8(a)(1) of the Act.

[19] Thus, having found that Martin and Prescott were discharged solely for having engaged in protected concerted activities, we find the Board's decision in *Wright Line, supra,* which clarified the Board's position in "mixed motive" discharge cases, to be inapplicable herein. Accordingly, we find it unnecessary to rely on the Administrative Law Judge's comments concerning the application of the *Wright Line* principle to the instant case.

Moreover, we disavow any comments made by the Administrative Law Judge concerning the application of *Wright Line* to Martin's discharge which may suggest that the General Counsel has the burden both of making out a *prime facie* case and of showing that an alleged discriminatee's discharge would not have occurred in the absence of

The Remedy

Having found that Respondent unlawfully terminated employees William Prescott and Klaus Martin for having engaged in protected concerted activities, we shall require that Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and shall require it to make them whole for any loss of pay they may have suffered by reason of the discrimination against them, with interest, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90

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any protected activity. Under *Wright Line*, the burden of showing that a discharge would have occurred even in the absence of any protected activity shifts to a respondent once the General Counsel makes out a *prime facie* case.

We further find *Butchers Union Local 115, supra*, upon which the Administrative Law Judge also relies, distinguishable from the instant case. In that case, the Board held that a respondent union did not violate the Act by discharging an employee because it believed that that employee "was seeking an executive position on its management staff at the expense of [an] incumbent official." The Board there noted that an employee of a union has no protected right under the Act to "engage in activities designed solely for the purpose of influencing or producing changes in the management hierarchy." Unlike *Butchers Union Local 115*, however, there is no evidence in the instant case to indicate that either Martin or Prescott was seeking to have any of the Respondent's officials removed from office in order to assume their positions or that Respondent in fact believed this to be the case. Rather, the evidence strongly suggests that, by their conduct, Martin and Prescott were attempting to maintain the integrity of their collective-bargaining representative by exposing what they believed to be corrupt internal union practices. Under these circumstances, we find the Administrative Law Judge's reliance on *Butchers Union Local 115* to be misplaced.

NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[20]

Respondent shall further be required to cease and desist from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the Respondent, Carpenters Local Union No. 35, San Rafael, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for exercising their right to engage in protected concerted activities under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer William Prescott and Klaus Martin immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them

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[20] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from its files any reference to the discharge of the above-named employees and notify them in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel action against them.

(d) Post at its San Rafael, California, office copies of the attached notice marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places at all locations where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[21] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 20, in writing, with 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. September 30, 1982

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

MEMBER FANNING, dissenting:

Martin and Prescott, employees of a labor organization, became concerned with the handling of the organization's funds, eventually had a credit check performed on an officer of their Employer, and filed a formal complaint with the Department of Labor. The two were subsequently discharged. The Administrative Law Judge found that the discharges stemmed from the complaint to the Department of Labor, but that the complaint was not a protected concerted activity under Section 7. The majority reverse and find that the Respondent violated Section 8(a)(1). I do not agree that in this context the actions of Martin and Prescott, public spirited through they may have been, were protected under the National Labor Relations Act.

A labor organization as an employer is subject to the same strictures under the Act as any other employer. But, also like any other employer, a labor organization has an inherent right to operate and maintain its business. The fact that its customers are "employees," and "terms and conditions of employment" its stock in trade, should not transmute into "concerted activity for . . . mutual aid or

protection" actions whose target is business practices of concern to workers as workers only by reason of the nature of the Respondent's business.[22]

The actions of Martin and Prescott were not directly related to "collective bargaining or other mutual aid or protection . . ." as set forth in Section 7 and were completely unrelated to their own terms and conditions of employment. They were disciplined as employees for their actions as employees with respect to their Employer's conduct of its business. As members of Respondent labor organization—the context in which they were entitled to protection here—Respondent took no action against them.

Martin and Prescott are entitled to no less protection than any employees acting in good faith on behalf of the public against the business interest of that employee's employer. But they are not entitled to protection under the National Labor Relations Act unless their purpose as well as their actions fit within the framework of Section 7. The mere fact that their Employer is a labor organization and its customers, who are the intended beneficiaries, are employees within the meaning of the Act, does not suffice.[23]

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[22] Thus, in *Misericordia Hospital Medical Center*, 246 NLRB 351 (1979), enfd. 623 F.2d 808 (2d Cir. 1980), employee complaints to an accrediting body about the operation of the hospital were protected because they involved staffing levels, an issue directly related to employee working conditions, and sanitation, the equivalent of employee safety.

[23] I cannot agree with the majority that Martin and Prescott acted as Respondent's members rather than as its employees. But the nature of the dual status of Martin and Prescott as both members and employees of Respondent may be so intertwined that no clear resolution can be had in this context. But, even if the two acted as members, the Respondent's right to manage its business must include the right to manage its own business affairs without interference from employees who are also members. The Respondent is not the representative of

I would dismiss the complaint.

Dated, Washington, D.C. September 30, 1982

John H. Fanning, Member
NATIONAL LABOR
RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

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Martin and Prescott, nor could it properly be so. As an employer the Respondent owes no "duty of fair representation" to employees, as we have explained in the past. See *Butchers Union Local 115, etc. (Ernest S. Cerelli)*, 209 NLRB 806 (1974), upon which the Administrative Law Judge relied and which the majority seeks to distinguish. The case is, and remains, one where employees sought to call their employer to account for its management of its business, not for its conduct in ordering its relations with its employees.

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge or otherwise penalize employees for engaging in protected concerted activity under Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfered with, restrain, or coerce our employees in the exercise of the rights guaranteed them in the National Labor Relations Act.

WE WILL offer William Prescott and Klaus Martin immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole, with interest, for any loss of pay they may have suffered as a result of our discrimination against them

WE WILL expunge from our files any reference to the discharges of the above-named employees and notify them in writing that this has been done and that evidence of this unlawful conduct will not be used a basis for future personnel action against them.

CARPENTERS LOCAL
UNION NO. 35
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 13018, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415-556-0335.

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Case 20-CA-14859
Case 20-CA-15029

Carpenters Local Union No. 35
and
Klaus Martin, An Individual
and
William J. Prescott, An Individual

Thomas E. Geidt, Esq., of San Francisco, CA,
Counsel for General Counsel.
Michael B. Roger, Esq., Van Bourg, Allen,
Weinberg & Roger, of San Francisco, CA,
for the Respondent.
Franklin Silver, Esq., Carroll, Silver &
MacDonald, of San Francisco, CA,
for the Charging Party.

DECISION

Statement of the Case

JOAN WIEDER, Administrative Law Judge: This case was tried before me at San Francisco, California, on May 22 and 23, 1980, pursuant to a complaint, as amended, issued by the Regional Director for the National Labor Relations Board for Region 20 on January 25, 1980, and which is based upon charges filed by Klaus Martin on September 14, 1979[1] in Case 10-CA-14859, and William J. Prescott on December 11, 1979 in Case 20-CA-15029. The complaint alleges that Carpenters Local Union No 35

[1] All dates herein refer to 1979 unless otherwise indicated.

(herein called Respondent or the Union) has engaged in certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (herein called the Act).

Issues

The primary issues are:

1. Whether activities engaged in by the Charging Parties, Martin and Prescott, are concerted and protected within the meaning of Section 7 of the Act; and if so,

2. Whether Martin's and Prescott's employment were terminated because they had engaged in concerted protected activities.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel and the Union on July 8, 1980.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Preliminary Matters

Counsel for General Counsel moved to amend the complaint at the commencement of the hearing. Counsel for Respondent vigorously objected to the motion, and was offered an opportunity to demonstrate that granting the motion without granting a postponement would prejudice the presentation of his case. A telegram informing counsel for Respondent that such an amendment would be proposed demonstrated that Respondent was not surprised by

the motion. However, Respondent was afforded the opportunity to renew its request for a continuance at any time it deemed necessary, and was assured a postponement would be granted if prejudice was shown. Respondent did not renew its request for a postponement. Accordingly, it is concluded that good cause for a continuance has not been shown and it is further found that the request for a postponement was properly denied.

II. Business of the Employer

Respondent, located in San Rafael, California, admits, and I find, that at all material times it is an unincorporated association engaged in the business of representing employees in bargaining with employers located within Marin County, California, with respect to wages, hours and other terms and conditions of employment. It also admits that during the past calendar year, in the course and conduct of its operations, it collected and received dues and initiation fees in excess of $50,000, and remitted to the United Brotherhood of Carpenters and Joiners of America, located in Washington. D.C., dues and initiation fees in excess of $50,000. Therefore, I find that the Union is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent also admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. General Background

The Charging Parties, Martin and Prescott, in addition to being members of the Union, were employed by Respondent as assistant business representatives. Martin was first

employed by the Union as an assistant business agent in July of 1975, for a 3-month term. After the expiration of his first term, he was rehired on a 3-month basis several times. Then his term was increased to a 6-month period, and he served two 6-month terms. In 1977, the manner of renewing his term was changed and he was hired for an "indeterminate" period of time. Prescott was initially employed on June 1, 1978 as an "organizer" Carpenters representative for a 6-month term. At the end of his first term, he was employed as an organizer and an assistant business representative with his term ending in June of 1979.

Martin and Prescott also were elected to the Union's Executive Board, which has 10 officer positions,[2] with votes, and 1 elected position, that of business representative, which has voice only, no vote. In 1977, Martin was elected as a trustee and Prescott as the conductor.[3] The terms of all officers expired on the first Tuesday of July 1979.

The constitution and bylaws of United Brotherhood of Carpenters and Joiners of America, which are applicable herein, describe the duties of trustees as follows:

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[2] President, vice-president, financial secretary, recording secretary, treasurer, warden, conductor and three trustees.

[3] The Union bylaws refer to the International's constitution and bylaws for the definitions and descriptions of duties for the various officers. The constitution, as amended January 1, 1979, describes the duties of conductor as follows:

> Section 38. The Conductor shall examine all present at the meeting and report to the President all without the Password. The Conductor shall allow no one to remain without the Password and shall obtain the names of all candidates awaiting initiation and report the same to the President and shall conduct the candidate through the initiation ceremony, and shall perform all duties pertaining to the office, and shall be furnished an assistant when necessary.

Duties of Trustees

A Section 40. The Trustees shall have the supervision of all funds and properties of the Local Union, subject to such instructions as they may receive from time to time from the Local Union. The title to all property of the Local Union shall be held in the name of the Trustees of the Local Union and/or their successors in office.

B It shall be the duty of the Trustees to see that the Treasurer or Financial Secretary deposits all monies received in such bank(s) as the Local Union designates. The Trustees shall see that the Recording Secretary of the Local Union notifies the bank(s) of the names of the officers duly authorized to sign checks for withdrawals on the account, and that all disbursements are to be made by check, except that a petty cash fund for either the Financial Secretary or the Treasurer is permitted.

C The Trustees shall audit all books and accounts of the Financial Secretary and the Treasurer, audit all receipts and accounts of any other person authorized to collect funds, examine the bank book(s) monthly, and shall report to the Local Union in writing, and semi-annually to the General Secretary on Bond Report forms supplied from the General Office; and shall perform such other duties as are provided for in the Constitutions and Laws of the United Brotherhood or as the Local Union may direct. Local Unions having annual receipts amounting to Twenty-Five Thousand Dollars ($25,000.00) or more from all sources shall engage a certified or registered public accountant for periodic audits, but not less than once a year. Such

> audits shall be examined by the Trustees for comparison with the Trustees' Audits and the Trustees shall report their conclusions in writing to the Local Union.

Only two elected officials are full-time employees of the Union, the business representative and the financial secretary.

In 1977, Martin was nominated for the office of business agent but lost the election to Clarence Murfin.[4] Reelected to the position of financial secretary was long-time officeholder William Wilson. As here pertinent, also elected at that time was George Mitchell as president. The recording secretary during the relevant period of time was Joseph Derrough and, also as here related, the position of vice-president was vacant.

Murfin, due to the recency of his incumbency as well as having achieved the postion of business representative after defeating Martin for that office, and promising others that they would be considered for the job of assistant business representative if he were elected, expressed a desire to have another member serve as his assistant. Under the auspices of the executive committee and the Bay Counties District Council of Carpenters, Murfin accepted Martin as his assistant business representative, reluctantly initially; however, later a good working relationship evolved. Martin was assigned the bulk of the office and legal work such as the processing of grievances.

In general, assistant business representatives are employed by Respondent pursuant to the recommendation of the business representative to the executive board which, after approving such recommendation, places the proposal before the general membership for their approval. It is

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[4] Murfin was also elected treasurer. As treasurer, he was a voting member of the executive board.

customary that the membership routinely approves these recommendations.

B. Events Leading to Cessation of Employment

There is no dispute that Martin and Prescott were performing their duties in an acceptable manner, rather argument arose over whether their employment was ended because they engaged in protected concerted activities or for other reasons. The activities alleged by General Counsel as the reason for the discontinuance of their employment is contended to be attributable to Respondent's desire to be rid of employees who charged Wilson engaged in certain improprieties at executive board and membership meetings; to the Department of Labor; and to other union officials at the local, Regional and International levels.

1. Martin

The allegations raised by Martin admittedly had their genesis in his activities as trustee. During January 1979, Martin expressed concern about the auditing firm traditionally employed by the Union because of a newpaper article that indicated the firm audited a local government agency and failed to discover that a retired employee had embezzled approximately $30,000. When Wilson failed to follow Martin's recommendation, Martin admittedly became upset. According to Martin, based on consultations with unnamed friends, he believed that the embezzlement should have been readily discovered by the auditors. Wilson's failure to act upon Martin's recommendation led Martin to consult with an alleged financial specialist[5] employed by the International.

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[5] An individual named Lloyd Larsen, who did not testify.

According to Martin, as a result of this consultation, he believed the trustees not only had a fiduciary duty to prevent embezzlement, but also that the trustees were responsible for and in charge of hiring the auditors. Martin and the other trustees decided to employ a new auditor. Martin made inquiries and asked for a proposal from an auditor he determined to be highly qualified. The three trustees reviewed the proposal and signed it. Martin then states that he informed the recording secretary of the trustees' action. In April, Wilson raised the matter of the trustees' actions at an executive board meeting,[6] stating that the trustees had no right to hire a different auditor without the Local's approval. The executive board, according to Martin's unrefuted testimony, agreed with the trustees. Wilson then brought the matter before the general membership, who voted to return the question to the executive board. The end result is that the firm employed by Respondent for the past 15 years was retained.

Martin testified that as a result of Wilson's desire to retain the "old" audit firm, he became suspicious and started looking more closely at the Union's books and records. Martin asserts that he discovered several improprieties.[7] These allegations will be discussed only for the purpose of determining whether the activities were protected within the meaning of Section 7 of the Act.

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[6] Martin describes Wilson as being furious.

[7] The merits of these allegations will not be considered herein because the evidence will not support such a finding, nor has it been claimed that these allegations were made maliciously or with knowledge of their falsity or for some similar improper motive; rather the question is whether the making of these allegations are protected concerted activities and, if so, was the leveling of these assertions the cause of the Charging Parties' loss of employment.

One allegation was that Wilson improperly paid the dues of retirees with union funds in contravention of the Local's bylaws and the International's constitution.[8] It is further alleged by Martin that Wilson, in contravention of specific instructions to comply with the International's constitution, surreptitiously continued to pay these dues, knowingly misstated the receipt of such funds, and improperly designated these individuals to be members in good standing. Another recommendation Martin made involved placing strike funds in Treasury Bills with the Wells Fargo Bank, which paid a higher interest rate. The Union's membership approved of the recommendation, but it is alleged that Wilson was very dilatory without good cause in complying with the members' directive.

Martin claims that his investigation also indicated that Wilson reimbursed Ed Fedrowitz[9] for expenses incurred in attending a district council meeting as "vice-president." Martin claims that the Union had no vice-president at that time; therefore, such a disbursement was asserted to be improper. Additionally, Martin raised the possibility that the necessary credentials were forged. It is undisputed that these allegations were made by Martin to the president of Respondent, Mitchell.

Martin served on the Union's welfare committee with Wilson. It came to Martin's attention that a $1,200 donation to the fund by a retired member was not reflected in a separate account and when, he asserts, his inquiry to Wilson failed to clarify the matter, he suspected that the donation may have been mishandled. Not only did Martin speak out to Wilson, Mitchell, the then president of the Local, at

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[8] It is undisputed the constitution takes precedence over the Local's bylaws in the event there are contradictory provisions.

[9] Fedrowitz was elected president for a 2-year term on June 7, 1979.

executive committee meetings, at general membership meetings, and by letter to the District Council; additionally, he, along with Prescott and several others, made these or similar complaints to the Department of Labor, Labor Management Services Administration. Martin, Prescott and several others[10] also complained to the Labor Management Services Administration about alleged improprieties in the June 7 election. The Department of Labor referred the election matters to the International as the first avenue to take in seeking redress. By letter dated June 21, Martin's attorney wrote the International asserting that: the notice opening nominations had failed to comply with the requirements of the constitution and bylaws; after finding all nominations were eligible on May 1, Prescott's nomination was found improper on May 2 because of alleged dues arrearages, thereby precluding the members from the option of timely substitution of another nominee; and that some members who voted in the election should be found ineligible because their dues were paid "out of improper funds and in an unlawful manner."[11]

This letter was read to the members at a regularly scheduled meeting held on July 17 by Joseph Derrough. According to Prescott's unrefuted testimony, Derrough read the names of the six signatories and referred to them as "troublemakers." Almost immediately thereafter, a long-term member, Mr. Borges, stood up and stated that about 23 years ago the Local had a problem with "some bad losers" and "they just threw . . . [them] out."

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[10] Including Mitchell, Respondent's president for the 1977-1979 term, and Kinney, the Union's warden.

[11] As an aside, it is noted that both the International and the Department of Labor found these allegations lacked merit or were insufficient to warrant requiring a new election or other relief.

Prior to going to the Department of Labor, Martin was investigating a contractor who, in addition to conducting business in Marin County, was also conducting business in San Mateo County. The business agent of the San Mateo County local telephoned Martin on May 1 to discuss this investigation and invited Martin to visit a San Mateo County jobsite with him the following morning. In uncontroverted testimony, Martin informed Murfin of of his plans to visit the San Mateo County location the following day, and Murfin did not object. When Martin reached the jobsite, he was assaulted by two of the individuals he had been investigating. The assault resulted in serious injury, and Martin was unable to work from that day until the date of the termination of his employment in September.[12]

Inasmuch as Martin had an "indeterminate term," on February 1, at a meeting of the executive committee, Wilson suggested that they determine the meaning of the phrase. Martin claims that the inquiry was initiated by Wilson because a personal letter to Martin from his attorney outlining his status was intercepted by Wilson. Be that as it may, the attorney, Burdick, opined that appointment for an "indeterminate term" meant that Martin "serves so long as the executive board sees fit. . . . your tenure is conditioned only upon [sic] by your keeping the Executive Board happy."[13] The minutes of the executive committee meeting of July 9, 1979 reflect that Martin's term of office

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[12] At the time of this hearing, Martin still was unable to return to work.

[13] Wilson contends that the inquiry was sparked by reports he received that Martin was telling members that he was appointed for life and these members were unhappy that they could no longer decide who would hold the position.

as assistant business agent was modified to expire on September 30, 1979.[14] Prior to the expiration of his term, Martin was discharged.

At the regularly scheduled general membership meeting[15] of September 4, Wilson moved that Martin be discharged. According to Wilson:

> The reasons that I made the motion are various. . . . I felt that Mr. Martin was creating a lot of problems for the Local Union. . . . for instance . . . he got himself injured . . . He was out of the area, not performing his duties as he was supposed to have been. . . .[16] He had no business in San Mateo County, . . . He never . . . asked permission of the business representative. . . . He never could get along with any of the persons in the office. He didn't get along with the secretaries,[17] he wasn't getting along with me. He was abusing his office . . . as the assistant business representative. . . . he went

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[14] Wilson also recommended to the executive committee, as reflected in the minutes of a regular general membership meeting held April 17, that the terms of office of all regular officers and business representatives expire at the same time. The matter of Martin's term was also discussed at the executive committee meeting of April 5, the regular membership meeting of February 6 and the executive committee meeting of February 1.

[15] It was admitted that Wilson and others inquired of the International office about the safest way of discharging Martin, and were informed that Martin should be terminated by vote of the membership, not the executive board to prevent Martin suing members of the executive committee.

[16] Martin's testimony that he informed Murfin of his plans was unrefuted by Murfin and is credited. This reason, therefore, is found to be mere pretext.

[17] Not one of the secretaries testified in support of this contention, and this assertion is also found to be a pretext.

> to the Marin County Credit Bureau . . . looking into financial records of members.[18] When he was confronted about it before the executive committee, he stated before the executive committee that he had his own record with the Martin County Credit Bureau, could get any record that he wanted, which was untruthful. That was one of the reasons I had made the motion was because of his dishonesty.

Another reason advanced by Wilson for his motion was the controversy occasioned by Martin's attempt to hire another accounting firm without the requisite approval of the membership. Also mentioned was the fact that Martin sought the advice of his personal attorney regarding his tenure and, Wilson alleged, that Martin was telling members that he had a job "for the rest of his life and . . . didn't have to run for the office, and this created an awful lot of dissension amongst the membership."

The recording secretary's notes and the minutes of the meeting indicate only that Wilson based the motion upon Martin's request that the Marin County Credit Association gather information about Wilson's finances. During the meeting, Prescott testified, Murfin announced that he

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[18] At Martin's urging, the Union established an account with the Marin County Credit Association in March 1978 to assist him in his investigations of contractors. In June of 1979, Martin requested the Marin County Credit Association to give him a personal report of Mr. Wilson's finances. In particular, he inquired if the Association could ascertain if Wilson had loans from any of the banks where the Union had its funds on deposit. Martin argued that he paid for the report and had his own account with the Marin County Credit Association. The membership in the Credit Association is listed in the Local's name and the Respondent paid all the charges. When the bill for the investigation of Wilson and his wife was received by the Union, Wilson became very irate over the matter. As an aside, it is noted that the credit report on Wilson did not disclose any conflicts of interest.

thought the membership should know that ". . . because of three men sitting in the hall right at that time, the government was coming into the office tomorrow." Murfin admitted mentioning "that at a certain date the Labor Department's coming in to have an interview with me." Another reason given for the discharge was that Martin failed to heed the written request of the members that he attend the September 4 meeting to answer the allegations against him. Martin did get a letter requesting his attendance but the missive failed to state the basis for the request. Martin did not attend the meeting.

The members at the meeting overwhelmingly voted to terminate Martin's employment as an assistant business representative.[19]

Martin testified that when he went to his office on September 5 to pick up his mail, he noticed Murfin was changing the locks on the doors in the presence of Wilson. Wilson asked Martin if he had a few moments and told him that the preceding night the Local had decided to discharge him. Martin stated he got very angry.[20] Martin claims that he told Wilson the only individuals who could discharge him were John Watts[21] and Clarence Murfin. Martin then sought out Murfin and alleges that Murfin stated Martin was fired "for going to the government and investigating Bill Wilson." Murfin also allegedly represented to Martin,

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[19] It is undisputed that the general membership had the authority to terminate Martin's employment, the question is whether such action was taken because Martin was engaged in protected concerted activity.

[20] At transcript page 175, Martin claims he got very angry, which is inconsistent with his testimony at page 333 of the transcript where he testified that he was already aware of the membership's vote, so when Wilson told him he was fired, "it was not really news to him."

[21] Watts is with the District Council.

in response to Martin's inquiry, that there was nothing wrong with his work. Murfin admitted that Martin's performance of his duties was very satisfactory, and said that Martin's version of the remainder of the conversation may be correct. Murfin was asked by Martin to put his evaluation in writing and Murfin said he would at a later date. Martin came to the office the next day, September 6, and asked Murfin if he prepared the reference. Murfin, according to Martin, stated that John Watts advised against his preparing the requested letter of recommendation.

Murfin denies discussing with Martin the reasons for his discharge. Murfin's testimony is not credited based on the lack of clear recollection of the events and the fact that Murfin did recall that Martin did discuss the issuance of a letter of recommendation with him, but he never reasonably explained why such a letter was not issued. Also, it was not shown that the alleged explanation given to Martin is consistent with past practice, which was that the advice of the International or District Council was sought, a course not shown to be standard practice. Further, Murfin admitted mentioning the forthcoming visit of investigators from the Department of Labor at the meeting the evening of September 4 when the matter of Martin's discharge was being discussed and it would be inherently consistent behavior to again discuss the Department of Labor's activities with Martin personally. Accordingly, Martin's version of this conversation is credited.

A few days later, Martin received the termination letter issued by Respondent stating the cause of his discharge was "for conduct unbecoming an officer." The letter did not state whether such "conduct" was the use of the Marin County Credit Association, going to the Department of Labor and alleging wrongdoing by Wilson, or both. It appears from the reasons advanced by Wilson, as well as the

reason given in charges filed by the Union again Martin with the Bay Counties District Council of Carpenters. that Martin's going to the U.S. Department of Labor and the investigation of the Wilsons using the offices of the Marin County Credit Association were two of the bases for his discharge, and I so find. I further find the General Counsel has not demonstrated that the discharge would not have taken place solely because Martin had Wilson's finances investigated by the Marin County Credit Association. See *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150(1980). The investigation of Wilson's finances using the Respondent's membership in the Marin County Credit Association has not been shown to be protected activity within the meaning of Section 7 of the Act, nor was this reason demonstrated to be based on pretext. All witnesses agreed that Wilson was extremely upset about this action by Martin and Wilson did feature the incident in explaining the reason for his recommendation to the members that Martin be discharged.

2. Prescott

Prescott was initially employed as an assistant business representative and organizer, with emphasis upon organizing duties, in the summer of 1978 for a 6-month period which expired in December of 1978. Prescott did not replace another assistant business representative; rather, he was an addition to the office staff. In December, no action was taken to renew Prescott's employment; however, the minutes of the executive committee meeting of January 4, 1979 indicate he was rehired as an assistant business representative and organizer for a term ending June 30, 1979.

Wilson claims that the term was renewed, not due to need but because he has determined that termination right

after the Christmas and New Year Holidays was undesirable and that the experiment of employing two assistant business agents, with Prescott devoting a substantial amount of time to organizing activities, would be continued for a short while. Murfin claims the experiment failed because Prescott did not substantially increase union membership; "not much organization was accomplished." Such considerations are not reflected in the minutes of the various meetings relating to Prescott's reappointment. Prescott contends that since January the demand for his services as assistant business representative and organizer increased. Prescott's testimony that, although he was paid for working 40 hours a week, he worked about 80 hours a week, is unrefuted.

On July 3, 1978, at a regular membership meeting, Prescott's letter requesting a 6-month extention of his appointment as assistant business representative was read, and the members referred the matter to the executive committee. The minutes of the executive committee meeting reflect that it was discussed by the new executive committee, which determined that the second assistant business representative was no longer needed. Also, according to Wilson and Murfin, Murfin did not see the necessity to continue Prescott's employment as an organizer and he had no need for a second assistant business representative.

Currently, Respondent employs one full-time and one part-time assistant business representative. The full-time employee is currently Gordon Matthews, and the part-time assistant is Wilson. Wilson assertedly only works as an assistant business representative when Murfin is away on business or vacation. No records substantiating this claim were presented by Respondent.

Wilson was appointed to serve as assistant business representative in September of 1979. His description of his

duties exhibits a lack of candor, for he stated that he did not visit jobsites during the week; however, when pressed, he admitted he may occasionally have visited jobsites during the week. Wilson also admitted that he performed the assistant business representative's function of reporting on his activities at regular membership meetings, much as Martin and Prescott had done before his appointment. Wilson also claimed that he had historically functioned as an assistant business representative when his services were needed, in addition to his duties as financial secretary. However, Wilson and Respondent never presented any documentation in support of this claim, which raises an adverse inference. As stated in *Northern Packing Co. v. Page,* 274 U.S. 65, 74, 47 S. Ct. 491, 71 L. Ed. 929 (1927):

> [T]he omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause.

A member of the Union, Edwin (Ted) Julianus, testified that he had a conversation with Wilson sometime around the month of October 1979 regarding the termination of both Prescott's and Martin's employment. According to Julianus, Wilson stated that the Charging Parties were fired, "that they had gone to the Department of Labor and filed charges . . . that Klaus Martin was in disability and was unable to perform his job." Respondent argues that Julianus' testimony is inherently incredible.

Julianus' testimony is found more credible than Wilson's, based on demeanor, textual consistency in his testimony and inherent probabilities.[22]

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[22] Respondent attempted to demonstrate that Julianus was friend of Prescott's, but failed to do so; rather, Julianus consistently testified that

Respondent's executive board also brought internal charges against Prescott on November 1, which included in the allegations of wrongdoing Prescott's participation with Martin in seeking assistance from the Department of Labor as well as the International. Furthermore, Derrough, as previously described, read to the general membership the letter Martin and Prescott signed seeking the International's assistance in correcting alleged improprieties. Derrough referred to the signatories as "troublemakers," and read their names to the membership. Also, the Union did not provide timecards or other documentation of the hours worked by the part-time assistant business representative, Martin, Prescott, or the present appointee to the full-time position, in refutation of Prescott's claim that he worked approximately 80 hours per week. Inasmuch as the record fails to disclose whether accurate records of hours worked were kept by the Union, no adverse inference will be drawn by this failure. However, the silence of Respondent on this matter is hereby deemed as a failure to support the claim that Prescott's term was not renewed because his services were no longer needed. Consequently, it is found that the claimed "good cause" reason advanced by the Union is mere pretext.

Analysis and Conclusions

In sum, it is found that while Martin's disability may have, as the Union argues, under Respondent's bylaws, justified his termination, the failure to adhere to the terms of the bylaws in a manner reasonably close to the time frame required therein leads to the conclusion that this reason for Respondent's action was not the actual cause for

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Wilson ascribed as the basis for the discharges the employees going to the Department of Labor.

their action. However, the Respondent could properly modify the term of office of any employee for any reason other than that employee's engaging in protected concerted activity. It is also concluded that the alleged discriminatees acted upon good faith beliefs and not with malice or deliberate falsifications. Nor can the conduct be found to be so offensive, defamatory or opprobrious as to remove it from the protection of the Act. In this proceeding, it is determined that a motivating factor in Prescott's and Martin's terminations was their complaining to the Department of Labor, the International and other union members about the alleged improprieties discussed above.[23]

Counsel for General Counsel argues that an employee's access to the Department of Labor in pursuit of enforcement of the policies expressed by Congress in the Labor Management Reporting and Disclosure Act is a protected activity. Citing *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975); *General Teamsters Local Union No. 528 (Theaters Service Company)*, 237 NLRB 258, fn. 1 (1978), and *Carpenters Local Union No. 22, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (William Graziano, d/b/a Graziano Construction Company)*, 195 NLRB 1 (1972).

Respondent argues that the complaint should be dismissed not only because General Counsel failed to establish improper motivation, but also because a violation of Section 7 rights has not been established. The Union claims that

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[23] As noted above, it is found that General Counsel failed to make a *prima facie* showing that Martin's discharge would not have taken place in the absence of the employee's activities which General Counsel alleges were protected, i.e., seeking the assistance of the U.S. Department of Labor. However, for ease of discussion, it will be assumed, *arguendo*, that Martin's activity of going to the U.S. Department of Labor was the reason for his discharge.

Martin's and Prescott's activities were: reacted to as employees and not as members of the Union; their membership status and rights were not infringed upon; and the parties have stipulated that no violation of Section 8(b)(1) of the Act has been alleged. There is no allegation that Respondent is or was the Charging Parties' representative. Therefore, there was no protected activity. Citing *Retail Clerks Local 770 (Carl Palmer)*, 208 NLRB 356, *Meat Cutters Local 115 (Ernest S. Cerelli)*, 209 NLRB 806, and *Retail Clerks 876 (Barbara Frazier)*, 212 NLRB 31.

It is uncontroverted that employees of a union enjoy the same rights as any other employees under Section 7 of the Act. See *Office Employees International Union Local No. 11 v. N.L.R.B.*, 353 U.S. 313 (1957). Section 7 of the Act safeguards the employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Martin's and Prescott's activities were, in the literal sense, "concerted." However, not all "concerted activities" are "for the purpose of collective bargaining or other mutual aid or protection." The record clearly fails to demonstrate that their activities were remotely connected to purposes of collective bargaining.

While protected concerted activities are not limited to cases where the employees are acting through unions or other formalized organizations, they must be acting together for mutual aid or protection. See *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolate Co., Inc.*, 130 F.2d 503 (2nd Cir. 1942).

As stated in *Johanna Cotton Mills Co. v. N.L.R.B.*, 176 F.2d 749 (4th Cir. 1949):

> It is true as argued by the Board that, where there is a bona fide concerted activity for any of the purposes

> named in the statute, its protection will not be denied because of the motives of those engaging in the activity; but it is not the motive of the participant that we are concerned with here but the 'purpose' of the activity. It is clear that that purpose had no relation to collective bargaining, hours or conditions of work or any sort of mutual aid or protection of employees. . . .

The cases cited by Counsel for General Counsel are not indicative or persuasive that the alleged discriminatees were engaged in protected activity. *Alleluia Cushion Co.*, 221 NLRB 999, involved complaints about safety by an employee who wrote to California OSHA. Safety has been clearly found to be encompassed in the phrase "mutual aid or protection." There is no allegation in the instant proceeding that complaint about safety is one of the reasons for the termination of Prescott and Martin. The reference by Counsel for General Counsel to *General Teamsters Local Union No. 528 (Robert Ayers)*, 237 NLRB 258 (1978), is also found inapplicable to the instant proceeding for it deals with a union's obligations as a representative, not an employer and, as noted above, there is no allegation that Respondent, as a labor organization, violated Section 8(b)(1)(A) or (2) of the Act. Furthermore, there was no question in the cited case that the activity was protected.

Finally, the allegations involved in *Jacobs Transfer, Inc.*, 201 NLRB 210, also cited by Counsel for General Counsel, involve hours, wages and other terms and conditions of employment which were found to be protected. The facts of this case will be examined to determine if Martin's and Prescott's activities are protected within the meaning of Section 7 of the Act.

The Board found, in *Carpenters Local Union No. 22, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Graziano Construction Company)*, 195 NLRB

1, that, although the discriminatees sought assistance from the Department of Labor pursuant to the provisions of the Labor-Management Reporting and Disclosure Act of 1959 rather than the National Labor Relations Act, such action does not "impel a different conclusion." The Board must consider all congressional mandates of labor policy in determining the legality of Respondent's actions. Consequently, General Counsel still has the obligation of demonstrating that the concerted activities are for collective bargaining or mutual aid or protection.

The basis Counsel for General Counsel advances for the alleged discriminatees' actions is that they ". . . were based on the sincere and conscientious conviction that corrupt or improper fiscal practices existed which needed remedying." Martin is the admitted primary activist and he stated that his activities were primarily, if not solely, in accordance with his obligations as a trustee, not as an employee of Respondent.

As an officer of the Union, Martin's intraunion activities would be unprotected. Intraunion activities are protected under Section 8(b)(1) of the Act, and unions owe such activists the duty of fair representation. However, as noted in *Butchers Union Local 115 (Ernest S. Cerelli)*, 209 NLRB 806 (1974):

> There is no concept of duty of fair representation under Section 8(a)(1) and (3) because an employer cannot represent employees in bargaining with itself. The cases cited by General Counsel in his brief in which violations of Section 8(b) are found are all distinguishable from the instant case where Respondent is alleged to have violated the Act as an employer and not as a labor organization. [J.D. at page 810.]

General Counsel admits that the activities of Martin and Prescott were not "solely for the purpose of influencing or

producing changes in the management hierarchy" of the employer or where "the thrust and purpose of their activities was to effect a change in the top management of the union-employer." Therefore, it cannot be argued that the actions of the employees were directed at poor supervision, which is a protected activity. In fact, Wilson and Murfin were unopposed in the election, hence there was no showing that the complaints about the election could or would have resulted in a change in supervision. Furthermore, the allegations of improper handling of union funds were not directed at the assistant business agents' supervisor, Murfin.

The other asserted improprieties raised by the alleged discriminatees go to such matters as which auditors are employed, which banks are utilized for depositing different union funds, the improper disbursement of funds to Fedrowitz as an officer in fiscal 1977-1978 prior to his election as an officer, the payment of dues for retired members, etc., have not been shown to have a potential impact upon Martin's, Prescott's, or other employees' wages or hours of work or any other sort of mutual aid or protection of employees. See *Joanna Cotton Mills Co. v. N.L.R.B., supra.*

The General Counsel has the burden of establishing by substantial evidence that the activity is protected, yet no documents or other evidence were placed in the record which are demonstrative that the activity was in relation to the mutual aid or protection of employees. Similar to the analogy presented by the Administrative Law Judge in *Butchers Union Local 115*, without showing impact upon wages, hours or other terms and conditions of employment, the attempts of employees to consult a responsible authority about a chief financial officer's conduct of a corporation's affairs would not, standing alone, support the finding

that Section 8(a)(1) and (3) of the Act had been violated. Since Respondent Union is considered solely as an employer, Martin and Prescott are in positions similar to corporate employees. The burden of proof is similar and there has been no showing that Section 8(a)(1) or (3) has been violated. Accordingly, it is recommended that the complaint be dismissed in its entirety.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[24]

The complaint is dismissed in its entirety.

Dated: October 10, 1980.

/s/ JOAN WIEDER
Joan Wieder
Administrative Law Judge

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[24] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by

Appendix D

Labor Management Relations Act, Section 157 (29 U.S.C. § 157):

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 158(a)(3) of this title."

Labor Management Reporting and Disclosure Act, Section 411(a)(2) (29 U.S.C. § 411):

> "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings; provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with his performance of its legal or contractual obligations . . ."

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the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Labor Management Reporting and Disclosure Act, Section 411(a)(5) (29 U.S.C. § 411):

> "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

Labor Management Reporting and Disclosure Act, Section 412 (29 U.S.C. § 412):

> "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

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MAY 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1270

In the Supreme Court of the United States

OCTOBER TERM, 1984

CARPENTERS LOCAL UNION NO. 35, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the National Labor Relations Board properly found, in the circumstances of this case, that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging two member-employees because they had complained to the Department of Labor about a union official's misuse of union funds and irregularities in union election proceedings.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1270

CARPENTERS LOCAL UNION NO. 35, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 739 F.2d 479. The decision and order of the National Labor Relations Board (Pet. App. A11-A29) and the decision of the administrative law judge (Pet. App. A30-A54) are reported at 264 N.L.R.B. 795.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1984. A petition for rehearing was denied on November 20, 1984 (Pet. App. A10). The petition for a writ of certiorari was filed on February 5, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Carpenters Local Union No. 35 (the Union) represents employees in Marin County, California (Pet. App. A12, A32). The Union is governed by a ten-member Executive Board which is elected by the membership (*id.* at A12-A13, A33). Two members of the Executive Board, the Financial Secretary, who manages the Union office, and the Business Representative, who administers the Union's contracts, are full-time paid employees of the Union. The Union also employs selected union members as assistant business representatives. *Id.* at A13, A33, A35. During the period relevant to this case, union members Klaus Martin and William Prescott were employed by the Union as assistant business representatives — Martin since 1975 and Prescott since June 1978. Additionally, during the period from July 1977 to July 1979, Martin and Prescott each held elective office in the Union, as Trustee and Conductor, respectively, and in those capacities both were members of the Executive Board. *Ibid.*

As a trustee, Martin was responsible, along with the other two Trustees, for supervising the handling of Union funds. In the course of his duties, Martin became concerned about the manner in which Union Financial Secretary William Wilson handled certain union funds. Pet. App. A13-A14, A36-A39. Specifically, Martin questioned several improprieties: (1) Wilson's choice of an accounting firm to audit the Union's books that had failed to discover a major embezzlement at another of the firm's customers; (2) Wilson's payment of retired members' dues from union funds, in violation of the International Constitution; (3) Wilson's reimbursement of the expenses incurred by an apparently unauthorized delegate for a District Council meeting; (4) Wilson's refusal to transfer certain Union funds to higher interest bearing accounts; and (5) Wilson's creation of a separate "welfare fund" account for union funds that was

not readily subject to oversight by the Trustees, as well as his handling of a specific donation for the welfare of the Union's members (*ibid.*). Martin raised these issues at regular union membership meetings and at Executive Board meetings between January and April 1979. Although Martin frequently clashed with Wilson over these matters, other members, including Prescott, supported Martin (*ibid.*).

In May 1979, one month before the upcoming union election, Martin and Prescott also contacted the United States Departmemnt of Labor (DOL) to complain that the Union had mishandled various funds, that irregularities had occurred in the election nominating process, and that members not in good standing would be allowed to vote in an upcoming election. Pet. App. A15, A39. The DOL told Martin and Prescott that it would take no action on their election complaints until they had exhausted their internal union complaint procedures. With respect to the allegations of misuse of union funds, the DOL advised Martin and Prescott that further substantiation would be needed. *Ibid.* Consequently, over the next few months, Martin and, occasionally, Prescott and other union members met several times with DOL investigators regarding the allegations of fund misuse. Martin also requested a credit check from the Marin County Credit Association as to whether Wilson had any personal loans or other business dealings with banks in which union funds were deposited to determine whether Wilson had a conflict of interest. Upon learning of the credit check, Wilson became quite irate. *Id.* at A15-A17, A42.

As the result of the union elections held on June 7, 1979, Wilson was reelected to the position of Financial Secretary, while Martin was defeated and Prescott was declared ineligible for Union office because he had been delinquent in his dues within the past twelve months (Pet. App. A15-A16, A39). On June 21, an attorney representing Martin, Prescott, and four other union members sent a letter to the

International Union protesting specific aspects of the June 7 election. The letter was signed by all the protesting union members. *Id.* at A16, A39.

Early in July, Prescott requested that his appointment as Assistant Business Representative, which had expired on June 30, be extended (Pet. App. A16). At that time, Prescott was working as many as 80 hours per week, because Martin, who two months earlier had been assaulted and disabled in the course of his duties, was unable to work at all (*id.* at A15, A46). However, the Executive Board voted not to renew Prescott's appointment, on the ground that a second assistant business representative was not needed at that time (*id.* at A16, A46).

On July 17, the next regular membership meeting, the June 21 letter of protest signed by Martin, Prescott, and four other union members was read aloud to the membership. The recording secretary also read the names of all the signatory members, denouncing them as "troublemakers." Pet. App. A16 & n.10, A39. On July 30, the International Union denied the challenges to the June 7 election, and the protesting members responded by disclosing additional details of alleged election and financial improprieties. After the International reaffirmed its prior determination, the protesting members filed formal charges with the DOL alleging irregularities in the conduct of the June 7 election as well as the misuse of union funds. *Id.* at A17.

At a regular union meeting on September 4, Wilson moved that Martin be discharged from his position as Assistant Business Representative. In support of the motion, Wilson pointed to Martin's request for a credit report on him. Pet. App. A17 & n.12, A41-A42. In addition, the Business Representative, Clarence Murfin, stated that, because of the activity of certain members sitting in the room, "the government was coming into the office" the next

day. (A DOL investigator was scheduled to meet with union officials the next day regarding the complaints filed by Martin and Prescott.) The membership then voted to dismiss Martin (*id.* at A17, A43).

The next day, Business Representative Murfin told Martin that he had been fired "for going to the government and investigating Bill Wilson" (Pet. App. A43). Moreover, in October, Wilson told another union member that Martin and Prescott were fired because they "had gone to the Department of Labor and filed charges" (*id.* at A47).

2. Adopting the factual findings but not the legal conclusions of the administrative law judge (ALJ), the Board found that the Union had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging Martin and Prescott because they had complained to the DOL about Wilson's misuse of union funds and irregularities in union election proceedings. The Board further found that the Union had also violated Section 8(a)(1) by discharging Martin because he had initiated a credit investigation of Wilson in connection with the DOL complaint (Pet. App. A11-A25). In so finding, the Board rejected the ALJ's conclusion that Martin's and Prescott's conduct was unprotected because they were merely acting in their capacity as employees to effect a change in management hierarchy. The Board found, instead, that Martin and Prescott were acting as members (and, in Martin's case, also as an officer) of the Union to expose what they believed to be corrupt internal union practices and thereby to maintain the Union's integrity as their collective-bargaining representative (*id.* at A21-A22 nn.18-19). The Board ordered the union to cease and desist from the unfair labor practices it had found, to reinstate Martin and Prescott to their former Union positions, and to award them backpay (*id.* at A22-A23).

3. The court of appeals upheld the Board's decision and enforced the Board's order (Pet. App. A1-A9).* The court agreed with the Board that Martin and Prescott, in complaining to the DOL, were engaged in concerted activity for the purpose of "mutual aid or protection" within the meaning of Section 7 of the Act, because "they were attempting to 'protect the integrity of their collective bargaining representative' " (*id.* at A6). The court explained that, "by seeking assistance from the DOL for alleged election and fund irregularities[,] * * * Martin and Prescott 'were * * * taking action of the sort that was reasonably likely to benefit both themselves and their fellow carpenters' " (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

Petitioner does not challenge the Board's finding, upheld by the court of appeals, that Martin and Prescott, by contacting the DOL, sought to protect "the integrity of their collective-bargaining representative by exposing what they believed to be corrupt internal union practices" (Pet. App. A22 n.19). Rather, petitioner contends (Pet. 5) that Martin's and Prescott's conduct was unprotected on the ground that it was not directly related to "their own wages, hours or other terms and conditions of employment," but was related to activities of their union only as a labor organization. This fact-bound contention does not warrant further review.

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* The Board sought enforcement only of those portions of its order that required the Union to cease and desist from its unlawful conduct and to reinstate Prescott with backpay. Martin had already settled with the Union concerning his reinstatement and backpay (Pet. App. A4).

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*" (emphasis added). As this Court recognized in *Eastex, Inc.* v. *NLRB,* 437 U.S. 556, 564 (1978), the activities protected by Section 7 are not limited to those intended to affect the immediate employer-employee relationship. Rather, the "mutual aid or protection" clause of Section 7 encompasses a broad range of other activities as well. See 437 U.S. at 565-566 & nn. 14-15 (collecting cases). Thus, it is well settled that Section 7 protects the right of union members to criticize the policies of their union and to resort to administrative and judicial forums in an effort to change those policies and that an employer who retaliates against its employees for engaging in such activities thereby violates Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1). See, *e.g., NLRB* v. *Transcon Lines,* 599 F.2d 719, 720-721 (5th Cir. 1979); *Aztech Electric, Inc.,* 244 N.L.R.B. 924, 927 (1979), enforced, 634 F.2d 635 (9th Cir. 1980). Moreover, as the Board recognized (Pet. App. A21 n.18), because a union, as an employer, must respect its members' rights under Section 7 of the Act (see *Office Employees International Union* v. *NLRB,* 353 U.S. 313 (1957)), it is also clear that a union violates Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by retaliating against its members for engaging in protected activities. See, *e.g., Hoisting & Portable Engineers, Local 4,* 189 N.L.R.B. 366, 374 (1971), enforced 456 F.2d 242, 243 (1st Cir. 1972); *NLRB* v. *Local 212, UAW,* 690 F.2d 82, 84-85 (6th Cir. 1982); cf. *Helton* v. *NLRB,* 656 F.2d 883 (D.C. Cir. 1981). As this Court explained in *NLRB* v. *Marine Workers,* 391 U.S. 418, 424 (1968) (footnote omitted), because "there should be as great a freedom to ask the Board for relief as there is to

petition any other department of government for a redress of grievances[,] [a]ny coercion used to discourage, retard, or defeat that access is beyond the legitimate interests of a labor organization."

Applying these principles here, the Board and the court of appeals correctly held that Martin and Prescott, by seeking assistance from the DOL for alleged election and fund irregularities, were engaged in concerted activity for the purpose of "mutual aid or protection" within the meaning of Section 7 of the Act because they were attempting to "protect the integrity of their collective bargaining representative" (Pet. App. A6). The happenstance that the Union retaliated against them in its capacity as their employer —by discharging them from their jobs as assistant business representatives — does not alter the protected nature of their actions.

Petitioners err in relying (Pet. 5-6) on the Board's so-called "patronage" decisions, which hold that newly-elected union officers may dismiss existing employees and install their own supporters. Those decisions rest upon the dual principles that a union may properly demand loyalty from and the cooperation of its employees and that a union employee, like any other employee, has no protected right to engage in activities designed solely to influence or alter the management hierarchy. Those principles, as the court of appeals correctly observed (Pet. App. A8), have no application to this case, because a union lacks a legitimate interest in shielding itself from a member's allegations that the union has engaged in illegal conduct. See *NLRB* v. *Marine Workers,* 391 U.S. at 424; page 7, *supra.*

Finally, contrary to petitioner's assertion (Pet. 6), the Board's decision in this case is not inconsistent with *Finnegan* v. *Leu*, 456 U.S. 431 (1982). That decision, like the Board's "patronage" decisions, merely held that a newly-elected union president does not violate the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 401, by discharging member-business agents who supported the defeated candidate. *Finnegan* did not consider whether a union would violate the LMRDA by discharging member-employees in retaliation for exercising rights guaranteed under Title I of the LMRDA, a situation analogous to that presented here (see 456 U.S. at 440-441). Moreover, the court of appeals correctly recognized (Pet. App. A7) that Section 8(a) of the National Labor Relations Act, unlike the LMRDA, protects a union member's status as an employee and his right to engage in collective activity. As the Sixth Circuit held in *NLRB* v. *Local 212, UAW* (690 F.2d at 85), "*Finnegan* * * * does not in any way diminish protection for concerted activity under the [National Labor Relations Act]." Accordingly, petitioner's reliance upon *Finnegan* is misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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